

Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

QOTD FILM INVESTMENT LTD.,

Plaintiff,

v.

MARY STARR, an individual;
JUDY RUSHING, an individual;
YURIY KUPCHENKO, an individual;
WADE COPE, an individual;
JOHN ALCANTAR, an individual;
MATT MAKOWICZ, an individual;
SONNY NGUYEN, an individual; and
MICHAEL COOK, an individual

Defendants.

Civil Action No. 16-cv-0371RSL

MOTION FOR LEAVE TO AMEND
COMPLAINT TO SUBSTITUTE PARTY

NOTE ON MOTION CALENDAR:
October 7, 2016

Plaintiff respectfully moves for leave to amend its complaint to substitute Brian Wilson for Judy Rushing. Support for this motion is outlined and below and supported by the accompanying declaration of counsel.

After receiving Internet Service Provider (ISP) information identifying subscribers, Plaintiff filed a first amended complaint naming subscribers on July 8, 2016. (Dkt. 16) With respect to Defendant Judy Rushing, service of the summons and compliant was accomplished on July 19, 2016. (Dkt. 20) That same day Ms. Rushing, unrepresented by legal counsel, contacted our office and alleged that her unidentified adult son, living at her residence, had admitted to and was responsible for the copyright infringement. Plaintiff indicated that if she would provide the

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INIP-6-0031P39 MOTAmSub

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1 identifying information, it would promptly seek leave to substitute the son. (Lowe Dec. ¶ 2) The
 2 next day Plaintiff was contacted by J. Curtis Edmondson, Esq., who claimed to represent
 3 Ms. Rushing and made several general inquiries about the case. Plaintiff explained the claims and
 4 again requested information about the identity of the responsible party, indicating that Plaintiff
 5 would promptly amend one that information was provided. (Lowe Dec. ¶ 3)

6 Rather than responding with the identification of the claimed responsible party—and
 7 without allowing Plaintiff an opportunity to substitute the responsible party—Defendant Rushing
 8 filed an answer and counterclaim on August 8, 2016. (Dkt. 27) At the Defendant’s instigation,
 9 Counsel for the parties had several discussions about settlement between August 11 and August 22,
 10 2016, during which time Defendant Rushing still refused to reveal the identity of the claimed
 11 responsible party. Finally, on August 22, 2016, Defendant Rushing identified her adult son, Brian
 12 Wilson, as the responsible party. (Lowe Dec. ¶4) After attempting unsuccessfully to reach
 13 agreement on a stipulated motion to substitute parties, the present motion to substitute promptly
 14 followed.

15 Defendant Rushing’s answer represents that the now-identified adult son, Brian Wilson, is
 16 the responsible party for the copyright infringement. Accordingly, Plaintiff respectfully requests
 17 leave to file a second amended complaint per FRCP 15 and LCR 15, in the form attached hereto
 18 as Exhibit A, substituting Brian Wilson for Judy Rushing and dismissing Plaintiff’s claims against
 19 Ms. Rushing along with her counterclaims of noninfringement.

20 Per Rule 15, such leave should be “freely give[n] when justice so requires.” In determining
 21 whether to allow an amendment, a court considers whether there is “undue delay,” “bad faith,”
 22 “undue prejudice to the opposing party,” or “futility of amendment.” *Foman v. Davis*,
 23 371 U.S. 178, 182 (1962). “The party opposing amendment bears the burden of showing
 24 prejudice.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). “Absent
 25 prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption
 26

1 under Rule 15(a) in favor of granting leave to amend.” *Eminence Capital, LLC v. Aspeon, Inc.*,
 2 316 F.3d 1048, 1051 (9th Cir. 2003).

3 Plaintiff respectfully submits that justice requires amendment here, as such amendment is
 4 necessary to include the admitted responsible party in the lawsuit. Moreover, there is no undue
 5 delay, bad faith or prejudice in this case. Plaintiff has diligently sought identification of the claimed
 6 responsible party—a son of the named subscriber—since notification of his existence and
 7 responsibility, and promptly, within days, filed the present motion once identification was
 8 received. Indeed, it was only due to Defendant Rushing’s delay in provide that information—while
 9 quickly filing an answer and counterclaims—that prevented Plaintiff’s amendment from taking
 10 place over the least thirty days. There can be no prejudice to Defendant Rushing as she will now
 11 be dismissed in favor of Mr. Wilson, and also because any delay was her own doing. Further, the
 12 amendment is not futile; as noted, if Defendant Rushing’s answer is to be believed, Mr. Wilson
 13 has already admitted responsibility for the copyright infringement.

14 Plaintiff certifies that it attempted to unsuccessfully to secure Defendant Rushing’s consent
 15 to this amendment, per Rule 15(a)(2). (Lowe Dec. ¶ 5)

16 RESPECTFULLY SUBMITTED this 6th day of September, 2016.

17 s/David A. Lowe, WSBA No. 24,453

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served to all counsel or parties of record who are deemed to have consented to electronic service via the Court's CM/ECF system.

s/ David A. Lowe